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Supreme Court of the United States

No. 863. October Term, 1940.

THE CITY OF NEW YORK,
Petitioner,

against

MICHAEL FEIRING, Trustee in Bankruptcy
of NATIONAL STUDIOS, INC.

ON WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT.

REPLY BRIEF FOR PETITIONER.

May 3, 1941.

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REPLY BRIEF FOR PETITIONER.

1. It is quite consistent to call the purchaser the taxpayer where the inquiry is into the incidence of the ultimate burden of the tax, and yet to contend at the same time that what the vendor (who has, or should have, collected the tax from his customers) owes the authorities he owes *qua* tax.

(a)

A meticulous doctrinaire consistency has never been an outstanding characteristic of tax jurisprudence. A Justice of this Court observed, not so very long ago, that "Logic and taxation are not always the best of friends." *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506, 522 (1923). Yet when we consider the universality with which is acknowledged the principle that "taxes are the life-blood of government, and their prompt and certain availability an imperious need" (*Bull* v. *United States,* 295 U. S. 247, 259 [1935]), it is not difficult to evolve, by inductive reasoning, a subjacent consistency in the decisions, which surface disharmonies obscure but do not destroy.

So here we again urge the Court to recognize the consistency of purpose beneath the superficially divergent arguments we are said to have made in *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940), on the one hand and in the instant case on the other. In the one case we sought to show the absence, in our system of local laws for sales tax collection, of any real burden on interstate commerce, since the burden of the tax, *i. e.*, the financial burden, fell not on the seller, who *was* engaged in interstate commerce, but on the purchaser who either *was not* so engaged, or proposed to use the articles (whose purchase by him was taxed) in interstate commerce only after they had become blended with the mass of property within the State. In the other case we seek to show that a vendor owes what he has or should have collected from purchasers *qua* tax and not *qua* debt even though as far as his own financial position is concerned he is not out-of-pocket the amount of the tax—having performed his duty of transferring the burden to the purchaser. This may still be true even though the Court hestitates to label him "taxpayer."

We submit that in the last analysis we are doing nothing more than resisting an attempt to impale upon the horns of a dilemma the sovereign authority * whom we represent.

The obvious purpose behind the provisions of the local laws requiring vendors to state the price separately to their customers, and to collect the tax from them, was efficiency of administration. Had the City resorted to the device of exacting returns from each purchaser, the expense of audit would have exceeded the revenue. *Cf.* JACOBY, *Retail Sales Taxation* (1938), page 100. When, therefore, the local leg-

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* We use the word "sovereign" advisedly and with proper sanction. *Matter of Atlas Television Co.*, 273 N. Y. 51, 57-58 (1936). See also *New York Steam Corp.* v. *City of New York*, 268 N. Y. 137, 145 (1935).

islature required vendors to make collections and lump them in a single return, to be filed by the vendor and to reflect his dealings with *all* his customers, no intent can be found, directly or by implication, to tolerate a diminution in the dignity of the claim against the vendor from the lofty status of a tax to the inferior status of a debt. Courts do not readily impale the sovereign on the horns of a dilemma, nor do they say "You must either exact multitudinous returns from separate purchasers or cease to claim for what the vendor owes you the rank of a claim for taxes." As Judge POUND once said in another connection: "Sovereignty is not thus dealt with." *Nitro Powder Co.* v. *Agency of Canadian Car & Foundry Co.*, 233 N. Y. 294, 298 (1922).*

(b)

The respondent's reliance (brief, p. 12) upon *Matter of General Merchandising Corp.*, 32 Fed. Supp. 805 (E. D. Pa., 1940), is misplaced. We deem the opinion an authority favorable *to us*, for two reasons: (1) it analyzes the *Atlas* case and concludes that in New York what the vendor owes he owes *qua* tax; (2) it finds that under the Philadelphia sales tax ordinance † the vendor has been held, by the state court of last resort, to be a collector, and that such holding

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* Especially, we may add, in administering laws designed to enable the sovereign to cope with an emergency. See page 27 of our main brief; and see *Builders Club of Chicago* v. *United States*, 83 Ct. Cl. 556, 14 F. Supp. 1020 (1936) where the Court said (p. 560): "A construction of a statute which produces a consequence opposed to the spirit of the legislation is to be avoided if possible. The language of the act is to be read in the light of its policy." *Cf.* the dissenting opinion of CARDOZO, J., in *Ashton* v. *Cameron County Water Improvement District*, 298 U. S. 513, 541 (1936).

† We need not detain this Court with an analysis of the Philadelphia ordinance. Suffice it to say that it expressly provided, *inter alia*, for the compensation of the vendor (through a percentage of the collections) for his services to the City *as collector*. *Blauner's Inc.* v. *Philadelphia*, 330 Pa. St. 342, 347-348, 198 Atl. 889 (1938).

is binding on the federal court. It follows syllogistically that a federal court sitting in New York ought to have deemed itself bound under the *Atlas* case (273 N. Y. 51) to hold that what the vendor owes he owes *qua* tax.

2. Any doubts raised by equivocal dicta in decisions of the Court of Appeals of New York have been dispelled by the *Brown Printing* case.

We readily admit that an occasional phrase in certain decisions of the Court of Appeals (see our main brief, p. 17, and the respondent's brief pp. 8-11), tend, especially when torn from their context, to cast doubt on our main thesis.

But we beg leave once more to assure the Court, with emphasis, that whatever doubts which might ever have been raised by these dicta, have been dispelled by the decision in *Matter of Brown Printing Co.*, 285 N. Y. 47 (1941), main brief, page 18. In an insolvency proceeding brought in conformity with state statutes, the insolvent belonging (like the bankrupt at bar)* to the genus of a retail merchant, conflicting claims to priority were put forward by the State of New York, with an unpaid franchise tax, and by the City of New York, with claims for sales taxes which had, or should have, been collected from customers, but which had never been handed over to the Comptroller. The Court of Appeals cut the Gordian knot by declaring parity of priority between the two claims, thereby recognizing that both were owing *qua* tax and not *qua* debt. This result would have been inconceivable under the established law of New York (see *Matter of Northern Bank of New York*, 212 N. Y. 608

* Actually the bankrupt was a film leasing agency, but the leases traded in were taxable like sales, under local law. See *Matter of United Artists Corp.* v. *Taylor*, 273 N. Y. 334 (1937).

[1914], main brief p. 20) had the City's claim not been for taxes; so that its character as such would seem to us to have been impregnably fortified by its attainment of parity with the State's claim for franchise taxes.

In *Matter of Torpedo Dress Corp.*, 285 N. Y., mem. p. 114 (1941), which the respondent (brief, p. 20) regards as virtually overruling the *Brown Printing* case though both decisions came down the same day, all that the Court of Appeals seemingly did was to hold * that the provision in the New York Labor Law (Consolidated Laws, ch. 31), § 522(6), added by L. 1937, ch. 142, p. 586, that claims for contributions to the unemployment insurance fund should (upon an insufficiency of assets) "have priority over all other claims, except taxes due the United States or the state of New York, and wages due for employment performed within the three months preceding such event [*i. e.*, the general assignment]", embraced taxes due the State directly and not taxes due to the City as agent for the State—a construction adopted, we assume, in furtherance of the special interests of the beneficiaries of the unemployment insurance fund, and not to be extended by implication beyond the special situation covered by the cited section of the Labor Law.

3. The policy behind the Chandler Act (52 Stat. 874) was to maintain sources of state and municipal revenue unimpaired.

Our arguments (brief, p. 28) as to the policy behind the Chandler Act have in no sense been answered by the respondent. He refers (brief, pp. 23-25) to the elimination by Congress of a number of state-conferred priorities in favor of certain classes of private claimants; and he says this was

* The decision was without opinion. So was the decision which it affirmed. 259 App. Div. 994. For the opinion in the Court of first instance, see 100 N. Y. L. J. 1479.

in pursuit of a desire to prevent them from consuming whole estates and leaving nothing to general creditors. But let us not forget that state taxes have been preferred since the day the original bankruptcy act was adopted, as we showed by the use of italics on page 10 of our main brief; and that nothing in the congressional document* cited by respondent (brief, pp. 24-25) indicates the slightest desire on the part of Congress to aid general creditors by altering the long established policy of conceding priority to claims for state taxes. It is even less likely that Congress intended to allow general creditors to enjoy the unmerited windfall of being able to augment their dividends through the bankrupt's virtual embezzlement (of course there was no *mens rea*) of funds (in this case $60 [R., 12]) earmarked for unemployment relief. This would seem a complete answer to what the respondent argues at page 25 of his brief.

Had Congress intended to accomplish a change of the law in this particular, it would surely have done so by changing the phraseology of §64(b)(6). But the Chandler Act, while renumbering §64(b)(6) to read §64(a)(4), leaves the substance of the language of this sentence unchanged, the crucial change being made in §64(b)(7), renumbered §64(a)(5).†

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* Analysis of H. R. 12889, 74th Congress, 2nd Session, at p. 201.

† The law prior to the Chandler Act provided that the Court should "order the trustee to pay all taxes, legally due and owing by the bankrupt to the United States, State, county, district, or municipality, in the order of priority as set forth in paragraph (b) hereof: * * *". And paragraph (b) set up seven grades of priorities of which the sixth was "taxes payable under paragraph (a) hereof." They were and still remain subordinated to administration expenses and wage claims. Under the Chandler Act it is provided that "debts to have priority * * * and the order of payment, shall be * * * (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof: * * *."

We submit that whatever was viewed as a tax "legally due and owing * * * to any State or * * * municipality" before the amendment remains so after it.

It is the fact, as we have shown (main brief, p. 28), that an awareness of the necessity of coming to the relief of municipalities pervaded the debates in Congress on the Chandler Bill itself. We may, therefore, go further and say that in all probability nothing was further from the legislators' minds than the accomplishment of the worsening of their condition which would occur if the decision below were allowed to stand.

Conclusion.

The order of the Circuit Court of Appeals and of the District Court should be reversed, and the cause remanded with directions to allow the asserted priority.

New York, N. Y., May 3, 1941.

Respectfully submitted,

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